Petition

81-1806

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LEROY BARNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the district court erred in denying defendant's motion for a new trial without an evidentiary hearing where defendant proffered in support thereof (a) exculpatory testimony from a non-severed codefendant unavailable at the time of trial and (b) *Brady* material in the possession of the Government prior to indictment (but never disclosed to defendant) which came to light only during a subsequent (and unrelated) trial conducted one year after defendant's conviction.

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LEROY BARNES,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Leroy Barnes respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinions of the Court of Appeals (Meskill, Cardamone and Holden, JJ.) (Appendix A, *infra*) and the District Court (Werker, J.) (Appendix B, *infra*) are not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of this Court.

Constitutional Provisions, Statutes and Rules Involved

Constitutional Provision:

The Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . .

Rule:

Rule 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment . . .

Statement of the Case

Indictment 77 Cr. 190, returned on March 14, 1977 by a grand jury in the Southern District of New York, charged seventeen individuals, including Leroy Barnes, with conspiracy to violate the federal narcotics laws (21 U.S.C. § 846) and with various individual substantive narcotics offenses. Count Two charged Barnes individually with superintending the entire conspiracy as a continuing criminal enterprise, occupying the role of organizer, manager and supervisor, in violation of 21 U.S.C. § 848.

Trial commenced on September 26, 1977 before the Honorable Henry F. Werker, J., and a jury. On December 2, 1977, after a ten week trial, Barnes was convicted on the conspiracy, continuing criminal enterprise and one substantive count of the indictment. On January 19, 1978, Barnes was sentenced under 21 U.S.C. § 848 to life imprisonment without parole and $100,000 fine, to run concurrently with a sentence of fifteen years' imprisonment,

$25,000 fine and lifetime special parole on the substantive count.

On April 23, 1979, the conviction was affirmed by a closely-divided panel of the United States Court of Appeals for the Second Circuit. *United States* v. *Barnes*, 604 F.2d 121 (2d Cir. 1979) (Moore and Van Graafeiland, JJ.) (Meskill, J., dissenting). On June 18, 1979, the Court of Appeals denied rehearing or rehearing *en banc* (604 F.2d at 175) (Oakes, Timbers and Meskill, JJ., dissenting from the denial of rehearing *en banc*). On April 21, 1980, the Supreme Court of the United States denied certiorari. *Barnes* v. *United States*, 446 U.S. 907 (1980).

On April 22, 1981, defendant Barnes filed a motion for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. On August 19, 1981, the district court filed a memorandum decision denying defendant's motion without an evidentiary hearing (Appendix B, *infra*). On January 28, 1982, the Court of Appeals affirmed (Appendix A, *infra*).

Barnes was convicted of engaging in a continuing criminal enterprise involving narcotics, in violation of 21 U.S.C. § 848. Enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, the continuing criminal enterprise statute requires proof going far beyond that necessary to sustain conviction under the general conspiracy statute enacted thereunder (21 U.S.C. § 846). *See, e.g., Jeffers* v. *United States*, 432 U.S. 137 (1977); *United States* v. *Sperling*, 560 F.2d 1050 (2d Cir. 1977); *United States* v. *Papa*, 533 F.2d 815 (2d Cir. 1976). In order to sustain Barnes' conviction, it was necessary for the Government to prove not merely that he was a simple arms-length participant in an ongoing conspiratorial network, but, rather, that he was the organizer of a continuous narcotics trafficking operation in concert with five or more other persons, as to whom he occupied a managerial or supervisory position and that he derived

substantial income or resources from the operation. *United States* v. *Sperling,* 506 F.2d 1323, 1344 (2d Cir. 1974); *United States* v. *Sisca,* 503 F.2d 1337, 1345 (2d Cir. 1974); *United States* v. *Manfredi,* 488 F.2d 588, 602 (2d Cir. 1973).

Critical to the Government's case against Barnes was the theory that he was the kingpin of a loose-knit aggregation of conspirators answerable to him whose activities at the Harlem River Motors Garage he was alleged to have managed and overseen. The proof that developed at trial, however, was distinctly at variance with the Government theory. Rather than establishing Barnes' control over the Garage, the evidence adduced the existence of at least two other major narcotics dealers—wholly unrelated to Barnes —who also operated out of the Garage, but whose separate transactions were being imputed by the Government to members of the so-called Barnes conspiracy.

Throughout the *Barnes* trial, the Governmnt steadfastly opposed and the trial court precluded, any and all defense attempt to explore the involvement of Robert Stepeney or Shepard Franklin at the Harlem River Motors Garage, either during cross-examination of various Government witnesses or even during the defense's case-in-chief. (*See e.g.,* Tr. 4162-64, 7684-90, 7719-23, 8039-41). Contrary to the rationale asserted by the Government at trial—that there was *no* evidence that Stepeney or Franklin were involved with the defendant herein and that it was Barnes, not Stepeney, who was on trial—even as it made these pious assertions during trial (*e.g.,* November 1977), the Government well knew that it had already garnered substantial evidence from DEA operatives (evidence in the nature of surveillance records and debriefing statements)—materials never disclosed to the *Barnes* defendants before or during trial—which established conclusively not only that Robert Stepeney was supervising his own large-scale narcotics operation in New York, but —more importantly—that it was being conducted in con-

junction with Shepard Franklin and Barnes' codefendant Steven Baker out of the Harlem River Motors Garage, among other places, and that various of Steven Baker's illicit activities charged in the *Barnes* indictment were being conducted not at the behest of Leroy Barnes, as alleged by the Government, but, rather, at the behest of Robert Stepeney.

Indeed, the Government already knew of Steven Baker's ties to Robert Stepeney at least as early as July 1976 (if not earlier)—six months before *Barnes* indictment was even handed down—yet failed to disclose such facts to the defendants in the *Barnes* case either before or during trial—evidence of crucial relevance not merely to Steven Baker but, even more critically, to Leroy Barnes, who was being charged with overseeing, managing and supervising a codefendant the Government already well knew worked for someone else entirely.

The Government's willful failure to disclose such plainly exculpatory evidence to the *Barnes* defendants—evidence it already possessed at the time of the *Barnes* trial—might never have come to light had not the Government chosen subsequently to pursue Robert Stepeney and secure an indictment against him. It is with the *Stepeney* indictment that the Government's defalcations in *Barnes* came to light.

Robert Stepeney, Shepard Franklin and the Harlem River Motors Garage

As early as January 1975, the DEA had been aware that Robert Stepeney, a/k/a "Big Robbie", had been operating out of the Harlem Garage. They regarded Stepeney as a major Harlem narcotics dealer, and had been conducting an intensive investigation into his dealings, using confidential informants to attempt to infiltrate his activities. In a February 1977 affidavit of DEA special agent Michael Pavlick, prepared in support of the Govern-

ment's electronic eavesdropping application for the Harlem Garage "bug", agent Pavlick referred at length to Stepeney's long involvement with narcotics activities at the Garage.

Moreover, the presence of Shepard Franklin, the owner of the garage, and the separate role he played in these transactions was significant, as well. Barnes' codefendant Wallace Fisher, in conversation with DEA undercover agent Louis Diaz, discussing the soon-to-be consummated March 11, 1977, narcotics transaction at the Garage, described the seller as the Garage's owner who was there every day driving a Mercedes—a description which precisely fit Shepard Franklin (Tr. 3147, 4143, 4436-47).

More importantly, Stepeney was involved at the Garage all during the course of the Barnes investigation. The Government noted, both in surveilliance reports and in other "3500" material, that Stepeney had been in possession of high quality narcotics at critical times during the alleged Barnes conspiracy. Particularly noteworthy was Stepeney's presence on the night of February 25, 1977. It was the testimony of Robert Geronimo and undercover agent Louis Diaz, that they had gone with Wallace Fisher to the Garage that evening to purchase a kilogram of heroin from Steven Baker and James McCoy (Tr. 2350-51, 4416-26). Geronimo and Diaz observed Barnes' Mercedes outside the Garage and witnessed the arrival of the limousine that had been used earlier in the December 29 heroin transaction at the Garage (Tr. 2354-57). Baker, however, never arrived that evening. Upon their return to the Garage after dinner, McCoy told Fisher that Baker had called and that the transaction was cancelled (Tr. 2357-58). Agent Diaz testified that Fisher said that Baker had been informed by "the boss" that all deals were off because of the presence of police (Tr. 4423-26).

While Geronimo and Diaz had testified to Barnes' presence in the Garage that night, DEA special agent Pavlick

placed two other individuals in the Garage as well: Robert Stepeney and Shepard Franklin (Tr. 4063-67, 4157-59). During Pavlick's cross-examination, it developed that Shepard Franklin, the owner of the Garage, and Stepeney were also at the Garage and that Pavlick had, in fact, seen Stepeney leave and return on at least five occasions that very evening (Tr. 4157-59, 4162).

The trial court, however, precluded the defense from any exploration of Stepeney's presence, finding such evidence irrelevant and, in any event, beyond the scope of the Government's direct (the Government having chosen not to bring Stepeney's presence to the jury's attention) (Tr. 4159, 4162).

In a formal offer of proof, the defense demonstrated what it would elicit about Stepeney from the witness. It developed that Stepeney already had been indicted as a major heroin dealer (although subsequently acquitted), and that the DEA had known of his "involvement" at the Garage for several years. Moreover, surveillance testimony demonstrated that Stepeney—an unindicted coconspirator herein—was present that night in proximity to the limousine at the time the car allegedly was being loaded. The clear relevance to Barnes of Stepeney's and Franklin's presence was unmistakable. In light of hearsay statements that the night's deal had been called off by "the boss", testimony that would have placed a second major narcotics dealer, as well as the Garage's owner, on the premises was pivotal to establish an alternate theory of defense, and to create a substantial question of fact for the jury; to wit, that Barnes was not "the boss", but, rather, that it was either Stepeney or Franklin.

This was not a generalized offer of proof tending to establish merely that other narcotics dealers operated in Harlem. Rather, the defense sought to prove specifically that the Garage transactions of February 25 and March 11, 1977, were the work of two individuals uncharged in

this case—Robert Stepeney and Shepard Franklin—and that a quantity of heroin found in June 1977, in the Garage safe actually belonged to Franklin and Stepeney, not to the defendants. The defense, for obvious reasons, sought to inform the jury of the circumstances of the sample's discovery, in view of its direct link between Franklin and Stepeney, with the obvious implication that they were running a separate narcotics operation from the Garage, had separate access to heroin of extraordinary purity and that various transactions imputed to Barnes were, in fact, wholly unrelated to him.

The significance to Barnes of this separate conspiratorial subgroup was crucial. It was the Government's theory that Barnes supervised all transactions and was, indeed, the "brooding omnipresence" over the Garage—an essential element of proof for it to prevail under the "continuing criminal enterprise" count of the indictment. The defense evidence sought to be elicited, however, left open the very colorable possibility that two other narcotics dealers—wholly unrelated to Barnes—were, indeed, "the boss" and were present to supervise activities at the Garage, including two of the major transactions that were charged herein.

The trial court, however, totally precluded the defendants from exploring this alternate theory and prevented the defense from presenting this colorable claim to the jury. Not only was the defense forbidden to introduce evidence of Stepeney's involvement in the Garage before the jury but the defense was prevented from bringing to the jury's attention a June 1977 laboratory report of a sample of heroin found in the Garage safe. Moreover, the Court prevented the defense from calling Garage accountant Sam Bellovin or IRS agent Ben Kukis to testify concerning the circumstances of the heroin's discovery—among *Robert Stepeney's* papers! (Tr. 7684-90). The defense offer of proof was twice rejected by the trial judge (Tr. 7719-23; 8039-41).

The Trial of Robert Stepeney

In December 1978, exactly one year after the conviction of the defendants in *Barnes*, an indictment was returned in the Southern District of New York charging five defendants, among them Robert Stepeney, with conspiring to violate the federal narcotics laws, in violation of 21 U.S.C. § 846. The operative period charged in the conspiracy was November 1, 1975 to the date of indictment (December 1978)—a period exactly paralleling that charged in the *Barnes* indictment. In addition, Stepeney—like Barnes—was charged separately in Count Two with having managed the entire conspiracy as a continuing criminal enterprise, in violation of 21 U.S.C. § 848. Stepeney became a fugitive immediately upon the return of the indictment and, in his absence, his four codefendants were brought to trial in March 1979.

Even in his absence, however, through the 3500 material (18 U.S.C. § 3500) and *Brady* material (*Brady* v. *Maryland*, 373 U.S. 83 (1963)) turned over to the *Stepeney* codefendants in preparation for, and during, the trial itself, along with the testimony of the Government's principal witness, a coconspirator informer named Clarence Gardner, substantial newly discovered evidence—evidence wholly undisclosed to the *Barnes* codefendants before, during or even after their trial—came to light which conclusively documented the close and well-nigh inextricable links between Robert Stepeney, Shepard Franklin and Barnes' codefendant Steven Baker—evidence which demonstrated conclusively that if Steven Baker had been *anyone's* lieutenant, it was Robert Stepeney, not Leroy Barnes.

Most importantly, the majority of this evidence was in the possession of the Government *prior* to the commencement of trial in *Barnes* and was material which could (and should) have been disclosed to the defense on that occasion. In light of the substantial probity of this evidence upon the question of Barnes' innocence or guilt on the Continu-

ing Criminal Enterprise count of his indictment—a question which may have turned pivotally on how the jury perceived the nature of his relationship with Steven Baker, among others, and the Harlem River Motors Garage—it is manifest that the evidence withheld by the Government in *Barnes* and disclosed in *Stepeney*—evidence relating to Stepeney's presence in the Garage during crucial periods of the alleged Barnes conspiracy as well as his close and long-standing business ties with Shepard Franklin and Steven Baker (dating back to the early 1970's)—constituted crucial corroborative evidence of defendant's original contentions in *Barnes*—contentions never permitted to be presented to the jury.

In July 1976 and September 1976, DEA agents and members of various Joint State Federal Task Forces commenced the debriefing of a confidential informant later disclosed to be a large-scale narcotics dealer by the name of Clarence Gardner. These debriefing sessions were conducted by the DEA in Philadelphia and concentrate on Gardner's dealings with various large-scale narcotics traffickers in various cities around the country. Among the names that figure prominently in Gardner's various debriefing were Robert Stepeney, Shepard Franklin and Steven Baker.

According to information Gardner supplied the DEA in July and September 1976—six months prior to the *Barnes* indictment—he had regularly made substantial purchases of heroin and cocaine in half kilogram and kilogram quantities from Robert Stepeney and Steven Baker between 1969 until 1975, when he went to prison on unrelated charges. According to Gardner's debriefing transcript, the procedure was for him to receive narcotics deliveries by delivering money to Stepeney and thereupon having the drugs delivered to him by Steven Baker.

Both of these debriefing statements, which clearly link Stepeney, Frankin—and Steven Baker—were in the possession of the Government long prior to indictment and trial in *Barnes* and, indeed, substantially corroborated the

arguments made at trial both by Barnes and Baker, that separate conspiratorial ventures occurring at the Garage were being imputed to Barnes, when they were, in fact, separate ventures, involving Stepeney, Franklin and Baker. Strangely, however, the Government remained studiously silent with regard to these allegations at the *Barnes* trial and never disclosed the instant reports to the *Barnes* defendants, even though they had had them available long before trial therein.

Most significant, however, was Clarence Gardner's live testimony at the *Stepeney* trial that indelibly forged the link between Stepeney, Franklin and Baker and demonstrated conclusively that whatever transactions Steven Baker may have involved himself in at the Harlem River Motors Garage concerned Shepard Franklin and Robert Stepeney—not Leroy Barnes.

In his direct testimony at the *Stepeney* trial—testifying as a Government witness—Clarence Gardner stated that from the early 1970's on, he purchased narcotics in New York from Robert Stepeney, Steven Baker and Stepeney's codefendant Herman Allen. Gardner admitted that he dealt with Stepeney, Baker and Shepard Franklin (a/k/a Soda Pop) at the Harlem River Motors Garage (which Franklin ran, according to Stepeney) and that after Stepeney went to prison upon his conviction for income tax evasion, in 1973, he continued to do business with Baker and Franklin at the Garage. He estimated that, over time, he had purchased at least 15 kilograms of heroin and cocaine from Stepeney, *et al.* and that Stepeney had told him that if ever he (Stepeney) wasn't around, he (Gardner) should simply continue to do business with Baker or Franklin in his absence.*

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* Indeed, on cross-examination, Gardner corroborated that when he had narcotics transactions with Stepeney in New York he never received the drugs directly from Stepeney. Rather, when he made purchases from Stepeney, he merely gave Stepeney the money, Stepeney then passed it on to Steven Baker, and it was Baker—not Stepeney—who then arranged for the delivery of goods to Gardner on Stepeney's behalf.

The overall implications of the Gardner testimony (and earlier corroborative debriefing statements) were significant and crucial. Taken in their totality, they confirmed (as the *Barnes* defense originally had alleged) that Robert Stepeney, Shepard Franklin and Steven Baker had been operating their own conspiratorial narcotics activities out of the Harlem River Motors Garage over the identical period alleged in the *Barnes* indictment and that, in the absence of any direct probative links between the activities of Barnes and Baker (of which there were none adduced at the *Barnes* trial), it is clear that whatever transactions were being consummated by Steven Baker were being arranged at the behest of Robert Stepeney—not Leroy Barnes.

The Proffered Testimony of Steven Baker

In light of the newly-discovered evidence which came to light in the *Stepeney* litigation further corroborating the *Barnes* defense's original allegation that (a) Steven Baker worked for Stepeney, not Barnes, and (b) the "boss" originally referred to in the February 25, 1977 conversations may well have been Stepeney or Franklin, Barnes moved for a new trial on the continuing criminal enterprise count of his indictment, proffering as well the newly-available testimony of codefendant Steven Baker on his behalf.

Steven Baker never testified at his own trial in his own defense, a decision based in no small part upon the trial court's denial of his pretial motion for a severance and his request for a separate trial. Accordingly, Baker not only failed to testify in his own defense, but perforce he was wholly unavailable to Leroy Barnes to testify in his defense that he was not, in point of fact, a Barnes lieutenant, but that, more importantly, whatever narcotics transactions he was allegedly involved in were undertaken in conjunction with Robert Stepeney and Shepard Franklin—not Leroy Barnes.

The trial and appellate process had run their course, thereby lifting those constraints which previously existed to prevent him from testifying. Baker submitted an affidavit detailing his willingness to testify that insofar as the Barnes conspiracy was concerned, he was involved wholly separately and apart from Leroy Barnes and that insofar as he may have been involved in transactions at the Harlem River Motors Garage, such transactions were engaged in on behalf of Robert Stepeney and Shepard Franklin—not Leroy Barnes.

Moreover, Baker was prepared to corroborate the allegations made in his pretrial severance motion that, insofar as he may have been involved in these actions at the Harlem River Motors Garage, they were transactions separate and apart from those allegedly engaged in by the members of the so-called Barnes conspiracy. Most importantly, Steven Baker was prepared to affirm under oath that, insofar as he was a "lieutenant" of anyone involved at the Harlem Motors Garage, it was Robert Stepeney—not Leroy Barnes.

The district court, however, rejected defendant's proffer, denying the motion without an evidentiary hearing. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

Newly-discovered exculpatory evidence, based in part upon prosecutorial non-disclosure of material in its possession before and during trial, warranted a hearing on Barnes' new trial motion.

The crux of the Government's case against Barnes centered around the Harlem River Motors Garage and Barnes' alleged managerial status over the Garage and various individuals involved in illicit narcotics activities there, among them, Steven Baker, whom the Government denominated a Barnes lieutenant—a role crucial to Barnes'

conviction of supervising five or more individuals as part and parcel of a continuing criminal enterprise (21 U.S.C. § 848).

At trial, Barnes sought to introduce evidence which would clearly have demonstrated that (a) various of the Garage transactions being imputed to him by the Government at trial were actually the work of two other individuals—Robert Stepeney and Shepard Franklin—and (b) that various of the codefendants who were allegedly his supervisees, among them Steven Baker, were actually members of separate conspiratorial networks, among them those being operated by Robert Stepeney and Shepard Franklin.

The Government steadfastly opposed the admission of any such evidence relating to Stepeney, Franklin and the Garage before the jury, on the ground that they were not on trial in the instant case and that, in any event, such evidence was "irrelevant" to the question of Barnes' innocence or guilt. The trial judge concurred and refused to allow any such evidence to go to the jury.

However, even as it made those assertions during trial (November 1977), the Government already had substantial evidence in its files from DEA operatives—material never disclosed to the *Barnes* defendants at trial—that Robert Stepeney was in fact supervising his own large scale narcotics operation out of the Harlem River Motors Garage in conjunction with Shepard Franklin and Steven Baker and that various of Baker's illicit activities out of the Garage were being conducted at the behest of Stepeney, not Barnes.

Much, if not most, of this exculpatory material surfaced before and during the *Stepeney* trial and plainly substantiates the contentions raised by Barnes at his trial that, in effect, he was being tried for "supervising" the illicit activities of someone else entirely. In light of the manifest materiality of this newly-discovered evidence to

the question of Barnes' guilt or innocence on the continuing criminal enterprise count, as well as the substantial question of willful prosecutorial "error" raised by the nondisclosure of the *Stepeney* 3500 material to the *Barnes* defendants, Barnes' request for a hearing on his new trial motion should, in all respects, have been granted. *Agurs* v. *United States*, 427 U.S. 97 (1976); *Brady* v. *Maryland*, 373 U.S. 83 (1963).*

Barnes sought to elicit testimony at trial that clearly would have established the presence of two major figures active in narcotics trafficking at the Garage on nights that two major transactions were being consummated. Such testimony would have created a significant question of fact for the jury as to whom Diaz thought Fisher thought McCoy referred to when he said that "the boss" called off the deal. Indeed, it was a crucial question for Barnes as to whom the jury decided was "the boss". Deprived of the knowledge that Stepeney and Franklin were present in the Garage that very night—the jury could make no other inference but that "the boss" was Barnes.

Thus, the probative nature of the evidence regarding Stepeney and Franklin can hardly be disputed. Were the jury to have known that these two major drug dealers were operating out of the same Garage in which Barnes was alleged to have been the over-lord, a significant ques-

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* Even in the absence of prosecutorial nondisclosure of evidence favorable to the defense—negligent or non-negligent—it is clear that even standing by itself, the newly-available testimony of Steven Baker relating to his noninvolvement with Barnes and his knowledge of those illicit activities of Stepeney and Franklin at the Garage, which were improperly imputed by the Government to Barnes, is evidence of such manifest materiality to the question of (a) whether Baker and others were, in fact, *not* Barnes' supervisees and (b) whether Garage transactions imputed to Barnes were, in reality, the activities of Stepeney and others, as to warrant an evidentiary hearing on the instant motion for a new trial. *Cf. Grant* v. *Alldredge*, 498 F.2d 376, 380-82 (2d Cir. 1974).

tion of fact would have existed whether it was Barnes who was, in fact, "the boss", as the Government alleged, or whether it was one of several other unrelated narcotics profiteers. Deprived of this knowledge, the jury could conclude only that Barnes was the one.

Clearly, in light of the crucial relevance of the undisclosed material to the defense (as well as the newly-acquired availability of the testimony of a codefendant critical to the question of Barnes' guilt or innocence on the continuing criminal enterprise charge), this case fits squarely within one or more of the categories of non-disclosure "where hindsight discloses that the defense could have put the evidence to not insignificant use." *United States* v. *Keough*, 440 F.2d 737, 741 (2d Cir. 1971). *See also, Lee* v. *United States*, 388 F.2d 737, 739 (9th Cir. 1968) ("Upon a motion for new trial based upon nondisclosure of evidence (as distinguished from one based on newly discovered evidence) the precise issue is what the Government had learned from the witness in question (and whether this should have led it to disclose his identity) rather than what this witness might now state under examination by the defendant.") *Cf.* 8A J. Moore, *Moore's Federal Practice* ¶ 33.04[2] at 33-41 (2d ed.).

The standard for review of the exclusion of such exculpatory evidence from the jury entails evaluating the possibility that the evidence, once admitted, "could . . . in any reasonable likelihood have affected the judgment of the jury," *Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *Johnson* v. *Brewer*, 521 F.2d 556, 563 (8th Cir. 1975); *Flores* v. *Estelle*, 492 F.2d 711, 713 (5th Cir. 1974).*

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* In the recent Supreme Court case, *Davis* v. *Alaska*, 415 U.S. 308 (1974)—in which the Court reversed the conviction because the defendant had been deprived of evidence in the possession of

(footnote continued on following page)

It is respectfully submitted that the Government's failure to disclose as *Brady* material the information it possessed from Gardner's various debriefings as to Baker's employment by Stepeney as well as Stepeney's (and Franklin's) continuing role in narcotics transactions operating out of the Garage clearly violated Barnes' right to due process since it constituted the withholding of evidence material to the very issue of guilt, *viz.* whether Barnes, in fact, supervised narcotics transactions in the Garage and, specifically, whether Baker even worked for him *at all* (as alleged by the Government). (*Brady* v. *Maryland*, 373 U.S. 83 [1963]).

As indicated earlier, the exculpatory evidence suppressed in the instant case was not "merely cumulative and impeaching." To the contrary, the suppressed evidence went to the very issue forming the basis of Barnes' alleged culpability as head of a continuing criminal enterprise and supervisor both of the Garage, and of Steven Baker, in particular (cf. *United States* v. *Rosner*, 516 F.2d 269 (2d Cir. 1975)). Further, under the circumstances of this case, the Government's failure to (i) provide the exculpatory evidence, after representing to the Court that *all Brady* material was exchanged and (ii) at least bring

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(footnote continued from preceding page)

the government establishing the past criminal conduct of a crucial prosecution witness—the Court stated:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning (i.e., that the witness had an ulterior motive stemming from his criminal past known to the prosecution) had counsel been permitted to try. But we do conclude that the jurors were *entitled* to have the benefit of the defense theory before them (i.e., to have full disclosure of admissions of crime) so that they could make an informed judgment as to weight to place on (the witness) testimony which provided "a crucial link in the proof . . . of the defendant's act." *Id.* at 317, quoting *Douglas* v. *Alabama*, 380 U.S. 415, 419 (1965) (Emphasis added).

the Gardner material to the Court's attention after defendants made a specific offer of proof as to the Stepeney-Franklin separate conspiratorial network at the Garage cannot be deemed inadvertent (cf. *United States* v. *Marquez*, 363 F.Supp. 802 (S.D.N.Y. 1973), *aff'd on opin. below* 490 F.2d 1386 (2d Cir. 1974)).

Recently, in *United States* v. *Agurs*, 427 U.S. 97 (1976), the Supreme Court observed the following with respect to the prosecutor's duty and obligation to disclose exculpatory evidence:

> "On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutors obligation to serve the cause of justice."*

In light of the direct and crucial relevance of the Gardner materials to the defense sought to be introduced by defendant Barnes—that the transactions being conducted at the Garage were the work of someone else and that one of his own codefendants was working for someone else entirely—the relevance of these materials could not have been lost on the Government. Indeed, it was specifically brought to their attention during the trial itself.

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* This standard has been reaffirmed by this Court only recently in *Smith* v. *Phillips*, 102 S.Ct. 940, 947 (1982).

In the instant case, of course, no disclosure, belated or otherwise, was made *at all.* Despite having been specifically alerted to the direct relevance of the defense's inquiry, the Government *never* voluntarily stepped forward to provide these materials to the defense, even after the trial had concluded. Had not these materials surfaced in the course of the subsequent *Stepeney* trial, the defense would not have known of them to this day.

Nor may the Gardner (and Baker) evidence be dismissed as merely cumulative or irrelevant to the defense. The Gardner testimony at the *Stepeney* trial (and his corroborative debriefing statements), taken in totality, confirm (as the *Barnes* defense originally had alleged) that Stepeney, Franklin and Baker had been operating their own conspiratorial narcotics activities out of the Garage over the identical period alleged in the *Barnes* indictment.

The trial court, however, totally precluded the *Barnes* defense from producing *any* evidence at the earlier trial to support its argument that (a) Barnes did not supervise all transactions occurring at the Garage, (b) the "boss" referred to by Wallace Fisher (quoting Baker) was not Barnes but Stepeney or (c) Steven Baker was arranging transactions (and working) for Stepeney, not for Barnes. Rather, the jury in *Barnes* was never even presented the opportunity, in the first instance, to consider the defendant's contentions that the transactions at the Garage were the work of someone else.

Thus, the probative nature of the evidence regarding Stepeney and Franklin can hardly be disputed. Were the jury given the opportunity to consider that two major drug dealers were operating out of the same Garage in which Barnes was alleged to have been the over-lord, during the same point in time, and that at least one alleged Barnes employee was working for someone else, a significant question of fact would have existed whether it was Barnes who

was, in fact, "the boss", as the Government alleged, or whether it was one of several other unrelated narcotics profiteers. Deprived of this knowledge, the jury could conclude only that Barnes was the one.

We are mindful, of course, that in evaluating the appropriate standards for the granting of the instant motion, a new trial is not called for at every instance where ". . . a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . ." *United States* v. *Keough*, 391 F.2d 138, 148 (2d Cir. 1968) quoted in *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975). Yet when the reliability of particular evidence may be determinative of innocence or guilt, "a new trial is required if (it) could . . . in any reasonable likelihood have affected the verdict of the jury . . ." *Giglio* v. *United States*, 405 U.S. at 154; *Napue* v. *Illinois*, 360 U.S. at 271.

Even when judged by the Second Circuit's most stringent standard—"whether there was a significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction" (*United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969); *United States* v. *Sperling*, 506 F.2d at 1333; *United States* v. *Seijo*, 514 F.2d at 1364 & n.9 (and cases cited therein))—it is clear that an evidentiary hearing on Barnes' new trial motion was warranted.

In light of the fact that the jury was never given even the barest opportunity to consider Barnes' alternate theory of defense—that it was Stepeney, not Barnes, who was "the Boss" of the Garage; in light of the previous unavailability of codefendant Steven Baker to confirm the fact that he worked for Stepeney, not Barnes; and in light of the colorable question of prosecutorial impropriety in the Government's nondisclosure of Gardner 3500 material at the *Barnes* trial (as well as the questionable propriety

of its indictment of Baker as a member of the *Barnes* conspiracy), it is clear that an evidentiary hearing on the instant motion is warranted in order to properly assess the full impact of defendant's newly-discovered evidence.

This is not a case like *United States* v. *Rosner,* 516 F.2d 269 (2d Cir. 1975), where a new trial was denied merely because the additional impeaching evidence adduced by the defense was cumulative at best and amounted to no more than *additional* evidence tending *further* to savage an already-discredited prosecutorial witness (516 F.2d at 273-74). Rather, in the instant case, the jury was never presented the opportunity, in the first instance, even to consider Barnes' contentions that the transactions at the Harlem River Motors Garage were the work of someone else—in this case, Robert Stepeney—in the face of the trial court's refusal to allow any such evidence to reach the jury, either through cross-examination or during the defense's case in chief. Under the totality of circumstances, then, an evidentiary hearing on defendant's new trial motion clearly was warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, N. Y.
March 29, 1982

Respectfully submitted,

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Appendix

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-eighth day of January, one thousand nine hundred and eighty-two.

PRESENT: HONORABLE THOMAS J. MESKILL, *Circuit Judge,*

HONORABLE RICHARD J. CARDAMONE, *Circuit Judge,*

HONORABLE JAMES S. HOLDEN, *District Judge.**

Docket No. 81-1332

UNITED STATES OF AMERICA,

Appellee,

v.

LEROY BARNES, a/k/a "NICKY",

Defendant-Appellant.

Leroy Barnes appeals from a judgment of the United States District Court for the Southern District of New York, Werker, *J.*, denying his motion, without an eviden-

* The Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

tiary hearing, for a new trial. This cause came on to be heard on the transcript of record and was argued by counsel. Appellant asserts that he is entitled to a new trial under Fed. R. Crim. P. 33 on the basis of "newly discovered evidence" which casts doubt upon his conviction of engaging in a continuing criminal enterprise involving narcotics, 21 U.S.C. § 848. 604 F.2d 121 (2d Cir. 1979), *cert. denied,* 446 U.S. 907 (1980).

A motion for a new new trial due to newly discovered evidence " 'should be granted only with great caution' and only upon a showing that the evidence could not with due diligence have been discovered before or during trial, that the evidence is material, not cumulative, and that admission of the evidence would probably lead to an acquittal." *United States* v. *Alessi,* 638 F.2d 466, 479 (2d Cir. 1980). We find that the evidence appellant offers in support of his request for a new trial is not material and would be unlikely to lead to an acquittal. We therefore affirm the district court judgment.

First, appellant asserts that a convicted co-defendant is willing to testify that he was not a member of the "Barnes narcotics organization" but was instead affiliated with a separate narcotics ring which operated out of the same location. The proffered testimony would establish, if true, only that a second narcotics organization existed, not that the Barnes organization did not. The co-defendant has not asserted in his affidavit that Barnes was not the leader of his organization or that the Barnes organization did not exist. We have already held that the existence of a second narcotics ring is irrelevant to the appellant's guilt. 604 F.2d at 149. Therefore, the testimony of the co-defendant is neither material nor exculpatory.

Appellant also asserts that the prosecution was aware of the existence of the second narcotics organization well before his trial and failed to disclose this knowledge in violation of *Brady* v. *Maryland,* 373 U.S. 83 (1963). Be-

cause the existence of a second narcotics organization is immaterial to appellant's guilt, the prosecution was under no obligation to disclose this information.

Finally, we do not believe that the evidence appellant now offers can be characterized as "newly discovered." Appellant was well aware of the existence of a second narcotics ring at the time of his trial and attempted to introduce evidence at that time. The district court found, and this Court held on appeal, that such evidence was irrelevant on the issue of appellant's guilt.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of the district court is affirmed.

Thomas J. Meskill, U.S.C.J.
Richard J. Cardamone, U.S.C.J.
James S. Holden, U.S.D.J.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff,

—against—

LEROY BARNES,

Defendant.

Memorandum Decision
S77 Cr. 170 (HFW)
August 17, 1981

HENRY F. WERKER, D.J.

On December 22, 1977, Leroy ("Nicky") Barnes was convicted by a jury, after a ten week trial, of (1) conspiring to violate the federal narcotics laws, in violation of 21 U.S.C. § 846; (2) engaging in a continuing criminal enterprise involving narcotics, in violation of 21 U.S.C. § 848; and (3) one substantive count of distribution and possession with intent to distribute narcotics, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A). Eleven co-defendants, including Steven Baker, were also convicted on the first and third counts. Barnes was sentenced to life imprisonment without parole and a $100,000 fine on the second count. Barnes' conviction was affirmed by the Second Circuit on April 23, 1979, *United States* v. *Barnes*, 604 F.2d 121 (2d Cir. 1979) and a rehearing was denied on June 28, 1979. The Supreme Court denied Barnes' petition for a writ of certiorari on April 21, 1980. *Barnes* v. *United States*, 446 U.S. 907 (1980).

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Barnes now moves pursuant to Fed. R. Crim. P. 33 for an order granting him a new trial upon his conviction for having managed a continuing criminal enterprise in violation of 21 U.S.C. § 848. This motion is based on Barnes' claim that newly discovered evidence has come to light which supports Barnes' alternate theory of defense—that it was Robert Stepeney and/or Shepard Franklin, and not Barnes, who was "the boss" of the organization operating out of the Harlem River Motors Garage ("the Garage"). The "newly discovered evidence" arises from two sources. The first is Steven Baker, a convicted codefendant of Barnes who has stated in an affidavit that he will now testify that he was not a member of Barnes' narcotics organization but was associated with two other major narcotics dealers, Robert Stepeney and Shepard Franklin, who also operated out of the Garage at the same time as Barnes. The second is Clarence Gardner, a Government witness who stated at trial in *United States* v. *Stepeney* (S.D.N.Y. 78 Cr. 78), and in debriefing sessions prior to the *Barnes* trial that he regularly purchased heroin and cocaine in large quantities between 1969 and 1975 from Baker, Franklin and Stepeney.

Discussion

Under Fed. R. Crim. P. 33, the court, in its discretion, may grant a new trial on motion of a defendant "if required in the interests of justice." It is well settled that new trials are to be granted with great caution particularly when sought on the ground of newly discovered evidence. *United States* v. *Alessi,* 638 F.2d 466, 478 (2d Cir. 1980); *United States* v. *Lombardozzi,* 343 F.2d 127, 128 (2d Cir.), *cert. denied,* 381 U.S. 938 (1965); C. Wright & A. Miller, 2 *Federal Practice & Procedure* § 551 (1969). A defendant who moves for a new trial pursuant to Fed. R. Crim. P. 33 has the burden of showing: (1) that the evidence is newly discovered and was unknown to the

defendant at the time of the trial; (2) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant; (3) that the evidence is material, not merely cumulative or impeaching; and (4) that admission of the evidence would probably lead to acquittal. *See United States* v. *Alessi,* 638 F.2d at 479; C. Wright & A. Miller, 2 *Federal Practice & Procedure* § 557. In accordance with the following, I find that Barnes has failed to show that this test has been satisfied with respect to the proffer of Steven Baker's testimony.

Steven Baker had moved prior to trial for a severence and separate trial from his codefendants on the ground that he never was part of the Barnes conspiracy and that his dealings in narcotics were isolated transactions with codefendants Steven Monsanto and James McCoy. His motion was denied by the trial court[1] and Baker thereafter refused to testify at trial in his own or Barnes' behalf.

From the foregoing, it is evident that the issue of Baker's denial of a connection with Barnes organization was raised at trial, and consequently, was known to Barnes. Therefore, it can hardly be said that this evidence is "newly discovered." In addition, although the fact that Baker's testimony has only now become available may be entitled to some weight in determining whether to grant a new trial, *see generally United States* v. *Jacobs,* 475 F.2d 270, 286 n.33 (2d Cir. 1973), *cert. denied,* 414 U.S. 821 (1973), I am unable to conclude that admission of the proffered testimony probably would lead to an acquittal. This is because Baker's testimony is non-exculpatory with respect to Barnes. Baker does not claim in his affidavit that the Stepeney-Franklin organization oversaw the Barnes organization or that Barnes did not in fact operate a narcotic enterprise of his own out of the Garage between January 1, 1974 and September 2, 1977. Rather, Baker merely states that while "various illicit activities may have taken place with the Garage as their principal situs, I was not a member of the Barnes or-

ganization . . .", and that "many of the illicit transactions at the Harlem River Motors Garage were the activities of Robert Stepeney and Sheperd Franklin, not Leroy Barnes." Consequently, the proffer of Baker's testimony is an insufficient basis for granting a new trial.

A comparison of the testimony proffered by Baker with proof tendered but rejected at trial and the reasoning of the Second Circuit in affirming the trial court's rejection of the testimony confirms my conclusion that a new trial is not required in this case. In addressing Barnes' contention on appeal that the trial court had erred in refusing to admit evidence that purportedly would have demonstrated that Robert Stepeney and/or Shepard Franklin were an alternate source of narcotics at the Garage and managed a drug enterprise separate from the one managed by Barnes, the Second Circuit observed:

> If the proffered evidence is viewed in the light most favorable to the defendants, the most that could have been proved was that Stepeney was a heroin dealer who worked out of the Harlem River Motors Garage. The defense did not offer any proof that Stepeney was the manager of an organization or was Barnes' partner, boss, or anything else. The Stepeney-Franklin operation was irrelevant to the existence of a Barnes conspiracy because it would merely have shown the existence of another division of the Barnes conspiracy, or at most, a parallel conspiracy which operated out of the Harlem River Motor Garage. Since there was sufficient evidence connecting all the defendants to the Barnes conspiracy, the trial court, which had the benefit of approximately six weeks of trial, was justified in excluding the irrelevant evidence of Stepeney's possible heroin activities.

United States v. *Barnes*, 604 F.2d at 149.

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Barnes' second argument in support of his motion for a new trial is that the Government was in possession of evidence disclosing Baker's ties to Stepeney six months before the Barnes indictment was handed down but willfully failed to disclose this evidence to the defendants either before or during trial in violation of the principles set forth in *United States* v. *Agurs*, 427 U.S. 97 (1976), and *Brady* v. *Maryland*, 373 U.S. 83 (1963).

This case does not involve the suppression of evidence indicating that "the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." Nor does it involve the suppression of information that defense counsel specifically requested from the prosecutor. Rather, it involves the obligation of the prosecutor "to provide defense counsel with exculpatory information when no request has been made" for the specific information but where "a general request for 'Brady material' has been made." *United States* v. *Agurs*, 427 U.S. at 103-07.

In this situation, the standard that must be applied has been explained as follows:

> if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id. at 112-13.

Barnes claims that the Gardner testimony "documents the close and well-nigh inextricable links" between

Stepeney, Franklin and Baker, and establishes "conclusively that if Steven Baker had been *anyone's* lieutenant, it was Robert Stepeney, not Leroy Barnes." Considering this new evidence in the context of the entire record including the strength of the evidence presented at trial, *United States* v. *Agurs*, 427 U.S. 97, 112 (1976), I must conclude that there is no reasonable doubt about Barnes' guilt and that there is no justification for a new trial.

First, I do not find Gardner's statements to be relevant or probative of the allegation that Baker was not a member of the Barnes conspiracy. Second, the testimony is in no way exculpatory of Barnes, who is not even mentioned. Third, it is exceedingly unlikely that the question of Barnes' guilt or innocence "may have turned pivotally on how the jury perceived the nature of his relationship with Steven Baker . . ." for the jury found nine other defendants guilty of conspiracy to violate the federal narcotics laws and of various substantive violations in addition to Barnes and Baker. Thus, even if Baker had not been found to be a "lieutenant" in the Barnes organization, the jury still could have found that Barnes was guilty of violating 21 U.S.C. § 848 by acting in concert with any five co-defendants as an organizer, and from which enterprise he obtained substantial income or resources. Thus, it is unlikely that this additional evidence "could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969).[2]

CONCLUSION

In accordance with the above, Barnes' motion for a new trial pursuant to Fed. R. Crim. P. 33 is denied.

SO ORDERED.

Dated: New York, New York
August 17, 1981

HENRY F. WERKER
U.S.D.J.

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NOTES

1. In affirming the trial court's denial of Baker's motion for a separate trial, the trial court held that "there was testimony from which a jury could infer that the transactions were more than isolated and that Baker was, in fact, a member of the Barnes conspiracy." *United States* v. *Barnes*, 604 F.2d at 158.

2. The Second Circuit reviewed the evidence establishing Barnes role as supervisor of a major narcotics conspiracy in affirming Barnes' conviction on Count Two. The court stated:

> In determining whether Barnes played a supervisory role in this continuing enterprise, the jury could have considered the evidence concerning his negotiations for the purchase of large quantities of quinine and mannite and could have concluded that purchases such as these would not be made by an underling in the organization. The jury could also have weighed the evidence concerning Barnes' arrangements for "money washing" and reached the same conclusion. Proof that Barnes rented two expensive apartments in New Jersey, masquerading in one as Hoby Darling and in the other as Wallace Rice, gave rise to a reasonable inference that he was entitled to exercise certain prerogatives of authority. Evidence that he was attended by bodyguards was likewise illuminating; ordinary narcotic dealers are not so carefully shielded. The jury could also conclude that narcotics underling do not drive around with $132,000 in cash in the trunk of their car.

United States v. *Barnes*, 604 F.2d at 158.

In addition to the foregoing, the court also noted that co-defendant Wallace Fisher had stated in taped conversations that Barnes was the "boss" who Fisher addressed as "Sir"; that Fisher had warned informer Robert Geronimo that "you don't confront a boss like that" when Geronimo complained to Barnes about the quality of heroin he had received; and that Fisher had told undercover agent Louis Diaz that "Nicky Barnes oversees all transactions that take place in the Garage." *Id.*

On these facts alone, the Second Circuit concluded that "the jury could fairly and logically have concluded beyond a reasonable doubt that Barnes was indeed a "boss" who supervised the activities of his co-conspirators and was guilty of violating Section 848." *Id.*